Supreme Court, U.S.
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In The
Supreme Court of the United States

MANJIT S. KANG,

Petitioner,

v.

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY, and the DEPARTMENT OF AGRONOMY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED*

Does section 704(a) of Title VII of the 1964 Civil Rights Act, which prohibits retaliation against an employee for filing a charge with the EEOC, permit an employer to engage in retaliatory action so long as that reprisal does not constitute an "ultimate employment decision"?

* The parties to this action are set forth in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Manjit S. Kang respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on October 3, 2003.

OPINIONS BELOW

The October 3, 2003, decision of the Court of Appeals, which is not officially reported, is reprinted in the Appendix to the petition. (1a-6a). The January 31, 2003, judgment of the District Court, which is not officially reported, is reprinted in the Appendix to the petition. (7a).

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on October 3, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 704(a) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice, made an unlawful employment practice by this title, or because he has made a charge, testified, assisted,

or participated in any manner in an investigation, proceeding, or hearing under this title.

STATEMENT OF THE CASE

Petitioner Manjit Kang is a professor at Louisiana State University ("LSU") in the field of agronomy.[1] In 1996 Kang filed a charge with the EEOC, alleging that LSU had discriminated against him when it selected the Department Head of the Department of Agronomy. Kang asserted that he was of East Indian ancestry and had been rejected on the basis of national origin in favor of a less qualified white candidate. Kang subsequently filed in federal district court an action under Title VII challenging the denial of that promotion. The court in that action granted summary judgment in favor of LSU. (App. 1a-2a and n.1).

In 1997 Kang filed a second charge with the EEOC, alleging that LSU had retaliated against him in a variety of ways for having filed the 1996 discrimination charge. Section 704(a) of Title VII prohibits retaliation against an employee for having filed a discrimination charge with the EEOC. Finally, in February 2000 Kang filed yet another charge of retaliation, alleging that LSU had taken several additional retaliatory acts in reprisal for the 1996 and 1997 charges. It is this third Title VII charge which is the basis of the instant lawsuit.

[1] Kang's appointment to LSU was apportioned between two separate campuses, each with its own chancellor: the LSU Agricultural Center (90%) and the LSU Agricultural and Mechanical College (10%).

Kang commenced this action in December 2000 in the United States District Court for the Middle District of Louisiana. The complaint alleged that LSU[2] had retaliated against Kang in five distinct ways. The most important alleged retaliatory act was giving Kang a smaller pay raise in reprisal for those earlier Title VII charges. The complaint asserted that in retaliation for the prior charges LSU officials had given Kang a raise of only 3%, which was lower than the average pay raise. The raises awarded to other full professors ranged from 0% to 7%. (App. 2a). In subsequent submissions Kang asserted that this below-average raise left him the lowest paid full professor in the department.[3]

The other alleged acts of retaliation included poor performance evaluations, writing up Kang for laboratory problems for which LSU knew he was not responsible, and unwarranted criticism.[4] (App. 2a).

LSU moved for summary judgment on the ground, inter alia, that Fifth Circuit precedent permitted the University to engage in the particular retaliatory practices alleged. LSU relied on the Fifth Circuit's "ultimate employment decision" doctrine, which construes section 704(a) of Title VII to forbid only those retaliatory actions which constitute an "ultimate employment decision." Those decisions stem from the seminal Fifth Circuit

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[2] The defendants named in the complaint were the Board of Supervisors of Louisiana State University and the University's Department of Agronomy.

[3] App. 2a.

[4] Complaint, Paragraphs 9-13.

decision in *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, *cert. denied*, 522 U.S. 932 (1997).

LSU argued, more specifically, that section 704(a) permitted an employer to reduce an employee's pay raise in retaliation for protected activity, at least so long as the employee was not denied a raise completely.

> Plaintiff's second claim is that he received a less-than-average pay raise of 3% . . . [T]his allegation . . . fails to constitute an ultimate employment decision. See *Mattern*, *supra*. While a decrease in pay can constitute retaliation, logically, a smaller-than-average raise cannot be considered the equivalent to a pay cut because, even if it is less than that given to others, it is still a raise. . . . Plaintiff is not entitled to any raise, much less to one equal to the "average" given to other professors. As such, his failure to receive a pay increase in excess of the arithmetic average cannot be an act of retaliation.

(Memorandum in Support of Defendant's Motion for Summary Judgment, p. 6).

In response, Kang expressly challenged the correctness of the ultimate employment decision doctrine in *Mattern*. Kang argued that at least three other circuits had expressly rejected the ultimate employment doctrine, as had the EEOC.[5] The district court, understandably bound by Fifth Circuit precedent, granted the motion to dismiss. (App. 7a).

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[5] Plaintiff's Opposition Memorandum to the Defendants' Motion for Summary Judgment, pp. 5-6.

In the court of appeals Kang again attacked the ultimate employment decision doctrine, arguing that *Mattern* and its progeny conflicted with decisions in the Seventh, Ninth and District of Columbia circuits.[6] The court of appeals acknowledged the existence of that conflict (App. 5a), and candidly recognized that

> "the continued vitality of the 'ultimate employment decision' doctrine is questionable in light of" recent Supreme Court decisions.

(App. 5a, *quoting Felton v. Polles*, 315 F.3d 470, 486-87 (5th Cir. 2002)). The panel below concluded, however, that it was bound by the earlier Fifth Circuit decision in *Mattern*. (App. 5a-6a).

The court of appeals agreed that in some instances it would violate section 704(a) for an employer to retaliate against an employee by denying that worker *any* pay raise at all. (App. 4a). But so long as the victim was given some pay raise, the Fifth Circuit insisted, Title VII permitted the employer to retaliate against the employee by giving him or her a smaller raise than would have been awarded in the absence of the protected activity.

> In the present case, . . . it is undisputed that [Kang] did receive a pay raise and that his raise was both substantial and larger than that received by some of his colleagues. Although we have never explained precisely when *denials* of pay raises constitute ultimate employment decisions, under the circumstances of this case, we cannot say that Kang has suffered an adverse

[6] Brief of Appellant, No. 03-30214 (5th Cir.), pp. 14-15.

> employment action. . . . [O]ur prior decisions compel this conclusion.

(App. 4a-5a) (Footnote omitted; emphasis added).

REASON FOR GRANTING THE WRIT

THE FIFTH CIRCUIT'S "ULTIMATE EMPLOYMENT DECISION" DOCTRINE CONFLICTS WITH DECISIONS IN EIGHT OTHER CIRCUITS

The Question Presented in this case concerns a mature and widely recognized conflict about the meaning of the anti-retaliation provision of Title VII. Section 704(a) forbids reprisals against employees for filing a Title VII charge, participating in an EEOC investigation, or otherwise opposing practices made illegal by Title VII. The Fifth Circuit applied in this case its longstanding rule that employers may engage in retaliation so long as the sanction inflicted on the employee in question does not constitute an "ultimate employment decision." As elaborated by a series of Fifth Circuit decisions, ultimate employment decisions are limited to such major employment actions as hiring, firing, demotions and wage reductions. Every other circuit to consider this restriction on section 704(a) has rejected the ultimate employment decision doctrine.

The ultimate employment decision doctrine is a well entrenched part of Fifth Circuit jurisprudence, to which that circuit continues to adhere despite the contrary views of numerous other circuits. The Fifth Circuit's ultimate employment decision doctrine was first announced in *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708-09 (5th Cir.), *cert. denied*, 522 U.S. 932 (1997). In the subsequent

years the Fifth Circuit has in 20 decisions[7] applied that idiosyncratic interpretation of section 704(a) (and of similar anti-retaliation provisions of other federal employment statutes) to declare that retaliatory actions allegedly taken by an employer were entirely lawful.

Eight circuits have expressly and emphatically rejected the Fifth Circuit's ultimate employment decision doctrine. Several courts of appeals have candidly recognized the resulting inter-circuit conflict.

In *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000), the Ninth Circuit disapproved the Fifth Circuit's ultimate employment decision doctrine, holding instead that section 704(a) forbids any retaliatory practice "reasonably likely to

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[7] *McDonald v. Entergy Operations Inc.*, 2003 WL 22134565 *2 (5th Cir.); *Ackel v. National Communications, Inc.*, 339 F.3d 376, 385 (5th Cir. 2003); *Johnson v. Louisiana ex rel. Louisiana Board of Supervisors*, 79 Fed. Appx. 684, 688 (5th Cir. 2003); *Bell v. City of Dallas*, 72 Fed. Appx. 82, 83 (5th Cir. 2003); *Fortenberry v. State of Texas*, 2003 WL 22135639 *2 (5th Cir. 2003); *Kang v. Board of Supervisors of Louisiana State University*, 2003 WL 22272920 (5th Cir.); *Foley v. University of Houston Syst.*, 324 F.3d 310, 313, 317 (5th Cir. 2003); *Hernandez v. Crawford Building Material Co.*, 321 F.3d 528 (5th Cir.), *cert. denied*, 124 S.Ct. 82 (2003); *Banks v. East Baton Rouge Parish School Bd.*, 320 F.3d 570 (5th Cir.), *cert. denied*, 124 S.Ct. 82 (2003); *Zaffuto v. City of Hammond*, 308 F.3d 485, 492 (5th Cir. 2002); *Soledad v. U.S. Dept. of Treasury*, 304 F.3d 500, 507 (5th Cir. 2002); *Green v. Administrators of the Tulane Educ. Fund*, 284 F.3d 642, 651, 658 (5th Cir. 2002); *Hunt v. Rapides Healthcare Syst.*, 277 F.3d 757, 769 (5th Cir. 2002); *Mota v. University of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 521 (5th Cir. 2001); *Thomas v. Texas Dept. of Criminal Justice*, 220 F.3d 389, 395 n.2 (5th Cir. 2000); *Walker v. Thompson*, 214 F.3d 615, 629 (5th Cir. 2000); *Watts v. Kroger Co.*, 170 F.3d 505, 508, 510 (5th Cir. 1999); *Burger v. Central Apartment Mgmt.*, 168 F.3d 875, 878 and n.3 (5th Cir. 1999); *Webb v. Cardiothoracic Surgery Assocs. of N. Tex.*, 139 F.3d 532, 540 (5th Cir. 1998); *Messer v. Meno*, 130 F.3d 130, 140 (5th Cir. 1997).

deter employees from engaging in protected activity." 217 F.3d at 1243.

> The circuits are currently split as to what constitutes an adverse employment action [prohibited by section 704(a)]. . . . [C]ircuits that define adverse employment action broadly are the First, Seventh, Tenth, Eleventh and D.C. Circuits. An intermediate position is held by the Second and Third Circuits. The most restrictive view of adverse employment actions is held by the Fifth and Eighth Circuits. . . . The Second and Third Circuits hold an intermediate position within the circuit split.

217 F.3d at 1241-42.

The Eleventh Circuit also has expressly rejected the Fifth Circuit rule.

> There is a circuit split on this issue. While the Eighth Circuit has sided with the Fifth Circuit, . . . the First, Ninth, and Tenth Circuits have all held that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions. . . . We join the majority of circuits which have addressed the issue and hold that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions.

Wideman v. Wal-Mart Stores, 141 F.3d 1453, 1456 (11th Cir. 1998).

In refusing to adopt the ultimate employment decision doctrine, the Fourth Circuit specifically disapproved the reasoning of the seminal Fifth Circuit decision in *Mattern*.

> [T]he majority of circuits have either implicitly or explicitly rejected the "ultimate employment decision" standard in § 2000e-3 cases. . . . [I]n *Mattern* . . . the Fifth Circuit expressly held insufficient the kind of discriminatory changes in the terms, conditions, and benefits of employment, which most other courts have recognized could constitute adverse employment action under § 2000e-3. . . . But "ultimate employment decision" is not the standard in this circuit. . . . [W]e have expressly rejected distinctions, like those drawn by *Mattern*.

Von Gunten v. Maryland, 243 F.3d 858, 864-65 (4th Cir. 2001).

Five other circuits have construed section 704(a) far more broadly than the Fifth Circuit. The First Circuit holds that section 704(a) forbids "actions such as . . . disadvantageous transfers or assignments, . . . unwarranted negative job evaluations and toleration of harassment by other employees," *Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994), all practices that are legal forms of retaliation in the Fifth Circuit. In the instant case one of the very retaliatory actions allegedly taken against Kang, and held lawful by the Fifth Circuit, was an assertedly unwarranted negative job evaluation. (App. 2a).

The Second Circuit construes section 704(a) to forbid any "materially adverse change" in the plaintiff's circumstances, *Torres v. Pisano*, 116 F.3d 625, 640 (2d Cir.), *cert. denied*, 522 U.S. 997 (1997). Such a retaliatory act is unlawful even if it does not "affec[t] money or benefits." *Wannamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997). In the Fifth Circuit even retaliation which *does*

affect money, as in the instant case, can be outside the protections of section 704(a).

The Seventh Circuit also interprets section 704(a) broadly, to include such retaliatory acts as putting "the complainant in a more unfriendly working environment." *Knox v. State of Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996). The Tenth Circuit avowedly construes section 704(a) "liberally," covering such things as co-worker harassment, which the Fifth Circuit has held is permissible under the ultimate employment decision doctrine. *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1264 (10th Cir. 1998). In the District of Columbia Circuit retaliation claims emphatically are not limited to "acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion," *Passer v. American Chemical Soc.*, 935 F.2d 322, 331 (D.C.Cir. 1991), the very limitation long imposed by the Fifth Circuit.

In the instant case the Fifth Circuit candidly acknowledged that its ultimate employment decision doctrine is more restrictive than "the broader rule adopted in some other circuits" (App. 5a), citing the contrary rule in the First, Fourth, Seventh, Ninth, Tenth and Eleventh Circuits. (App. 5a n.13). In *Zaffuto v. City of Hammond*, 308 F.3d 485, 492 (5th Cir. 2002), the Fifth Circuit recognized that

> [t]he courts of appeals are split on this issue. The Fifth and the Eighth Circuit have adopted the "ultimate employment decision" standard. . . . Every other circuit to address the issue has held that employment decisions falling short of ultimate employment decisions may suffice.

Similarly, the Fifth Circuit acknowledged the existence of this circuit conflict in *Burger v. Central Apartment Mgmt.*, 168 F.3d 875 (5th Cir. 1999).

> Our court has analyzed [section 704(a)] in a stricter sense than some other circuits. . . . We are not alone, but we are in the minority.

168 F.3d at 878 and n.3.[8]

This case presents a uniquely appropriate vehicle for determining the correctness of the ultimate employment decision doctrine. The Fifth Circuit's decision in the instant case marks the most expansive and destructive application of that doctrine. The court below held, at the express urging of respondents, that section 704(a) permits an employer to reduce the size of the pay raise awarded to a worker for the avowed purpose of punishing that employee for having filed a Title VII charge with EEOC. Respondents, of course, deny having acted with any such motive, but under the decision below there would have been no violation of section 704(a) even if respondents candidly admitted such an invidious retaliatory purpose.

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[8] Similarly, in *Hernandez v. Crawford Building Material Co.*, 321 F. 3d 528 (5th Cir. 2003), one member of the panel observed:

> A majority of the federal circuits that have considered the question have held that the protection afforded by the anti-retaliation provision [of Title VII] extends to adverse employment actions that, while substantial, fall short of ultimate employment decisions. . . . Indeed, the only other circuit that purports to follow the "ultimate employment decision" rule, the Eighth Circuit, in practice applies something broader.

321 F.3d at 533.

In the wake of the decision in the instant case, an employer anywhere in Louisiana, Texas, or Mississippi could openly announce and implement an express policy of paying smaller raises to any employee who filed a Title VII charge, brought a Title VII action, spoke to an EEOC investigator, or complained about discriminatory treatment. If an employee had already filed a charge or lawsuit, the employer could coerce the worker into withdrawing that charge or lawsuit by threatening to slash all of his or her future raises.

The instant Fifth Circuit decision authorizing that retaliatory tactic poses a lethal threat to the administrative and judicial enforcement schemes established by Title VII. The EEOC has concluded that the ultimate employment decision doctrine obstructs enforcement of Title VII.

> [A]llowing employers to take retaliatory measures short of an "ultimate employment decision," . . . would stifle employees' willingness to complain of discrimination.[9]

> An employer who can retaliate with impunity using methods that fall short of an "ultimate employment decision" . . . will inevitably discourage employees from participating in Title VII proceedings or opposing unlawful practices.[10]

The EEOC Compliance Manual expressly rejects the ultimate employment decision doctrine.

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[9] Brief of the EEOC as Amicus Curiae in Support of Plaintiff, Von Gunten v. Maryland, No. 00-1058, pp. 24-28.

[10] Brief of the EEOC as Amicus Curiae, Wideman v. Wal-Mart Stores, No. 97-2897, pp. 16-19.

> Some courts have held that the retaliation provisions apply only to retaliation that takes the form of ultimate employment actions. . . . The Commission disagrees with those decisions and concludes that such constructions are unduly restrictive. The statutory retaliation clauses prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.

EEOC Compliance Manual, ch. 8, pp. 13-15 (footnotes omitted).

The decision below is emphatically inconsistent with this Court's decision in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). *Robinson* held that a primary purpose of section 704(a) is "maintaining unfettered access to statutory remedial mechanisms." 519 U.S. at 848. The economic and deterrent impact of a retaliatory decision to reduce an employee's raise by $500 is precisely the same as a decision by the employer to award the usual raises but then impose on that worker a $500 annual fine for as long as the worker remains at the firm in question. It is inconceivable that Congress intended to permit employers to use such reprisals to punish or deter utilization of the administrative and judicial enforcement mechanisms created by Title VII.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Manjit S. KANG, Plaintiff-Appellant,
v.
BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY; Louisiana State University Department of Agronomy, Defendants-Appellees.
No. 03-30214.
Summary Calendar
Oct. 3, 2003.

Appeal from the United States District Court for the Middle District of Louisiana. USDC No. 00-CV-906-C-M-1.

Before HIGGINBOTHAM, EMILIO M. GARZA and PRADO, Circuit Judges.

PER CURIAM.*

Appellant Manjit S. Kang appeals the district court's grant of Appellee's motion for summary judgment on his employment discrimination and hostile work environment claims. For the reasons stated below, we AFFIRM the district court.

I.

Since 1986, Kang has worked as a professor in the Department of Agronomy at Louisiana State University ("LSU"). In 1996, Kang filed a claim with the Equal Employment Opportunity Commission ("EEOC"), alleging

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

that LSU had discriminated against him when it rejected his application to become Department Head of the Department of Agronomy. LSU selected another faculty member, a white man, for the position, and Kang believed he had been overlooked because he was of East Indian descent. On September 30, 1997, Kang filed a second claim with the EEOC, alleging that LSU retaliated against him after the filing of his first claim of discrimination. Shortly thereafter, he filed his first suit in district court, raising claims of discrimination and retaliation, but this suit was subsequently dismissed on summary judgment.[1]

On December 4, 2000, Kang filed the instant suit in district court. Kang claimed that he had been subjected to additional retaliation, complaining of five specific acts. First, in April 1999, he received a poor performance evaluation from Freddie Martin, the Head of the Department of Agronomy. Second, while he was out of the country on a lecturing assignment, he was "written up" by Appellee for "unacceptable conditions" in one of his research areas. Third, he received a less-than-average pay raise of 3% in July, 1999, making him the lowest paid professor in the department. Fourth, Appellee failed to nominate him for a teaching award, even though he had been nominated in previous years. Finally, the Department Head "unfairly and unjustly" criticized him at a faculty meeting on January 14, 2000 in front of his peers.

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[1] See *Kang v. State of Louisiana*, 229 F.3d 1147 (Table) (5th Cir.2000), *cert. denied* 531 U.S. 1126, 121 S.Ct. 881, 148 L.Ed.2d 790 (2001).

II.

The district court concluded that Kang could not make out a prima facie case of retaliation under Title VII of the Civil Rights Act of 1964[2] and granted summary judgment for Appellee because none of the acts Kang complained of constituted "ultimate employment acts."[3] We find no fault in the district court's conclusion.

To state a claim of retaliation under Title VII, plaintiff must demonstrate: "(1) that she engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse employment action."[4] In *Mattern v. Eastman Kodak Co.*, we concluded that only "ultimate employment decisions" – decisions relating to "hiring, granting leave, discharging, promoting, and compensating" – satisfy the second prong of this test.[5] To satisfy this standard, the action complained of must "have more than a 'mere tangential effect on a possible future ultimate employment decision.'"[6] Thus, " 'interlocutory or mediate' decision[s] which can lead to an ultimate decision" are insufficient to support a prima facie case of

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[2] 42 U.S.C. § 2000e-3(a).

[3] *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir.1997) (" 'Ultimate employment decisions' include acts 'such as hiring, granting leave, discharging, promoting, and compensating.' ".

[4] *Evans v. City of Houston*, 246 F.3d 344, 352 (5th Cir.2001) (*quoting Long v. Eastfield Coll.*, 88 F.3d 300, 304 (5th Cir.1996)).

[5] *Mattern*, 104 F.3d at 707.

[6] *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 519 (5th Cir.2001) (*quoting Walker v. Thompson*, 214 F.3d 615, 629 (5th Cir.2000)).

retaliation[7]. Under this standard, none of the actions that Appellant complains of, even if true[8], qualify as "ultimate employment decisions." Our decisions reject the proposition that his first complaint – that he received a poor performance evaluation – qualifies as an adverse employment decision[9]. Similarly, the other actions allegedly taken by Appellee – failing to nominate him for a teaching award, unjustly criticizing him in front of his peers at a faculty meeting, and writing him up for not keeping his research area clean – do not "constitute 'adverse employment actions' because of their lack of consequence."[10]

Kang's final allegation, however, is a closer question. Kang claims that, in July 1999, he was given a less-than-average pay raise, causing him to be the lowest paid professor in his department. In *Fierros v. Texas Department of Health*, we explained that a denial of a pay increase can be an "ultimate employment action," despite our suggestion in Mattern to the contrary[11]. In the present case, however, it is undisputed that Appellant did receive a pay raise and that his raise was both substantial and

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[7] *Mattern*, 104 F.3d at 708 (5th Cir.1997).

[8] For purposes of our review of the district court's grant of summary judgment, we accept as true Appellant's allegations. See *Casey Enterprises v. American Hardware Mutual Insurance Co.*, 655 F.2d 598, 601-02 (5th Cir.1981). Appellee, of course, denies that Kang's filing of discrimination charges in any way affected their interaction with him.

[9] *Mattern*, 104 F.3d at 708.

[10] *Id.*

[11] 274 F.3d 187, 193 (5th Cir.2001) ("In cases since *Mattern*, we have held that a denial of a pay increase and similar actions are 'ultimate employment decisions.'").

larger than that received by some of his colleagues[12]. Although we have never explained precisely when denials of pay raises constitute ultimate employment decisions, under the circumstances of this case, we cannot say that Kang has suffered an adverse employment action.

Appellant candidly admits that our prior decisions compel this conclusion. He argues, however, that our approach to Title VII retaliation cases is unduly restrictive and asks that we endorse the broader rule adopted in some other circuits[13] Indeed, we have ourselves noted that "the continuing vitality of the 'ultimate employment decision' doctrine is questionable in the light of" recent Supreme Court decisions[14]. Nonetheless, "[i]t is well-established in this circuit that one panel of this Court may not overrule another" unless the prior decision " 'is overruled, expressly or implicitly, by either the United States

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[12] Kang admits that he received a raise of 3%. Others on the LSU faculty received raises ranging from 0% to 7%.

[13] See, e.g., *Von Gunten v. Maryland*, 243 F.3d 858, 865 (4th Cir.2001); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir.1998); *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir.1996); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984-86 (10th Cir.1996); *Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir.1994); *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir.1987).

[14] See *Felton v. Polles*, 315 F.3d 470, 486-87 (discussing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998)); see also *Watts v. The Kroger Co.*, 170 F.3d 505, 510 n. 4 (5th Cir.1999) (expressly declining to reach the question whether *Burlington's* definition of "tangible employment actions" is identical to *Mattern's* definition of an "adverse employment action").

Supreme Court or by the Fifth Circuit sitting en banc.'"[15] Accordingly, we decline Kang's invitation to alter our approach to Title VII retaliation claims.

III.

In addition to his claim of retaliation, Kang contends that the district court erred in dismissing his claim that Appellee's actions created a "hostile work environment." To satisfy the requirements of a claim for hostile work environment, however, a plaintiff must demonstrate that an employer's discriminatory actions were "sufficiently severe or pervasive that they . . . alter[ed] the conditions of employment and . . . create[d] an abusive working environment."[16] The actions that Kang complains of, while potentially inappropriate, do not satisfy this standard.

IV.

Because none of the actions on which Kang bases his retaliation claim rises to the level of an "ultimate employment decision," he has failed to make a prima facie showing of retaliation. He has also failed to demonstrate that the Appellee's actions were pervasive or severe enough to create a hostile work environment. For these reasons, the judgment of the district court below is AFFIRMED.

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[15] *Central Pines Land Co v. United States*, 274 F.3d 881, 893 (5th Cir.2001) (*quoting United States v. Kirk*, 528 F.2d 1057 (5th Cir.1976)).

[16] *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591 (5th Cir.1995).

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

MANJIT S. KANG

CIVIL ACTION

VERSUS

NO. 00-906-C

BOARD OF SUPERVISORS OF
LOUISIANA STATE UNIVERSITY

JUDGMENT

For the reasons read into the record:

IT IS ORDERED ADJUDGED AND DECREED that the motion for summary judgment filed on behalf of defendant is hereby GRANTED, and this action is hereby dismissed.

Baton Rouge, Louisiana, January 31, 2003.

/s/
RALPH E. TYSON
UNITED STATES
DISTRICT JUDGE